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No.

IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1984

STATE OF ILLINOIS,

Petitioner,

vs.

THOMAS FOGEL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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39 pp

QUESTIONS PRESENTED

1.

Whether this case involves an issue also presented in the pending case of Oklahoma v. Castleberry (No. 83-2126, cert. granted, No. 5, 1984).

2.

Whether the automobile exception to the search warrant requirement applies to the search of a vehicle which has just been parked and left by a suspect.

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APPELLATE COURT OF
ILLINOIS, FIRST DISTRICT

Petitioner, the State of Illinois, respectfully prays that a Writ Of Certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, First District, which was entered on June 29, 1984.

OPINION BELOW

The unpublished opinion and order of the Appellate Court of Illinois, First District is reproduced as Appendix A to this Petition. The order of the Illinois Supreme Court denying leave to appeal from that decision is reproduced as Appendix B to the Petition.

JURISDICTION

The opinion, order and judgment of the Appellate Court of Illinois, First District was entered on June 29, 1984. The order of the Illinois Supreme Court denying leave to appeal from that decision was entered on October 2, 1984. This Petition for a Writ of Certiorari is filed within 60 days of that date. United States Supreme Court Rule 20(1). The jurisdiction of this Court in invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION AT ISSUE

UNITED STATES CONSTITUTION - FOURTH AMENDMENT:

The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

Certain police officers discovered 68 pounds of marijuana during a search of the automobile of respondent Thomas Fogel. After a hearing on respondent's motion to suppress, the trial court suppressed that evidence. (R. 58) The Appellate Court of Illinois, First District, affirmed the order suppressing evidence and the Illinois Supreme Court denied leave to appeal. (Appendices A and B) The State of Illinois now seeks review by this Court.

On December 27, 1982, Chicago Police Officer Robert Smith obtained a search warrant for respondent's person and for respondent's house in Glenview, Illinois. (R. 69) The affidavit for the warrant recited that a reliable informant had helped respondent carry two large bags of

marijuana from the trunk of a car into the house. (R. 70-71)

On the afternoon of December 28, Officer Smith and other Chicago Police officers arrived at respondent's house. Respondent was not there, but a man inside the house refused entry to the officers, so they had to force their way in. (R. 18-19) The officers searched the house for an hour and a half, but discovered nothing. (R. 20)

As the officers were finishing their search, respondent and his wife arrived at the door of the house. The officers stopped them, and saw that respondent's car, which had not been present when the officers arrived, was parked 20 to 25 feet away in the driveway. (R. 21-22, 25) Respondent was searched, and two bags of marijuana and a bag on cocaine were re-

covered from his briefcase. (R. 22-23) $2,865 in cash was recovered from the purse of respondent's wife. (R. 28)

Officer Smith then took the keys to the car from respondent and searched the vehicle. (R. 25) In the trunk he found two large plastic trash bags filled with marijuana. (R. 25-26)

After laboratory test results were returned, respondent was charged with possession of marijuana with intent to deliver and with possession of cocaine. (R. 75-77) The trial court suppressed the evidence recovered from the trunk of respondent's automobile, and the State appealed from that decision. (R. 95)

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN ISSUE ALSO INVOLVED IN OKLAHOMA V. CASTLEBERRY, NOW PENDING BEFORE THIS COURT.

On November 5, 1984, this Court granted certiorari in a case involving the same question as that presented in this matter. Oklahoma v. Castleberry, (No. 83-2126, cert. granted, Nov. 5, 1984). That question is whether the automobile exception to the search warrant applies when police officers arrest a suspect outside a parked car and the officers have probable cause to search the vehicle.

In Castleberry, the officers, acting on a tip, arrested a suspect on drug

charges. At the time of the arrest the suspect threw a small object into the interior of his parked automobile and locked the car door. The officers, using the suspect's keys, searched the interior of the automobile and the trunk, and recovered narcotics. The Oklahoma Court of Criminal Appeals ruled that a warrant had been necessary to justify a search of the automobile. Castleberry v. State, 678 P.2d 720 (Okla. Crim. 1984). This Court accepted jurisdiction, partly in order to decide if the search fell within the automobile exception to the search warrant requirement.

This Illinois case present similar facts and legal issues. Here also the police officers encountered a suspect outside his parked automobile. Here also the officers lawfully arrested the suspect and used the suspect's keys to search the

trunk of the vehicle. Here also contraband was recovered from the truck. Here also the state reviewing Court held that the search of the trunk was unlawful as it had been performed without a warrant.

Therefore, certiorari may be granted in this case without consuming a large amount of this Court's scare time and resources. This case could either be consolidated with Castleberry or be given a summary disposition after Castleberry is decided.

II.

THE AUTOMOBILE EXCEPTION TO THE SEARCH WARRANT REQUIREMENT APPLIES TO THE SEARCH OF A VEHICLE WHICH HAS JUST BEEN PARKED AND LEFT BY A SUSPECT.

It is clear that under the automobile exception to the search warrant requirement the police may perform a warrantless search of a vehicle they have stopped on a highway. It is less clear whether that exception can apply to a parked automobile. This Court should grant certiorari in order to resolve this important Fourth Amendment issue.

Here, the police were performing a lawful search of respondent's house when respondent unexpectedly drove up in his automobile and parked it. The officers, who had a search warrant for respondent's

person, searched respondent and found cocaine and marijuana. At that point the officers had both probable cause to arrest respondent and probable cause to search the automobile. Using respondent's keys, the officers searched the trunk and recovered 68 pounds of marjuana.

After the officers had arrested respondent, there were two things they could have done with respondent's automobile. The first would have been to impound the vehicle pending an application for a search warrant. The second was to perform an immediate search of the vehicle. The decisions of this Court indicate that the officers acted correctly in deciding to make an immediate search. Under the automobile exception to the search warrant requirement, officers with probable cause to search a vehicle may perform an im-

mediate search, and do not have to impound the vehicle and apply for a warrant.

Numerous decisions of this Court hold that when police officers encounter an automobile and have probable cause to search, they may search the vehicle without a warrant. Michigan v. Thomas, 458 U.S. 259, 102 S.Ct. 3079, 73 L.Ed.2d 750 (1982); United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); Colorado v. Bannister, 449 U.S. 1, 101 S.Ct. 42, 66 L.Ed.2d 1 (1980); Texas v. White, 423 U.S. 67, 92 S.Ct. 304, 46 L.Ed.2d 209 (1975); Cady v. Dombrowski, 413 US. 433, 93 S.Ct. 2523, 37 L.Ed.706 (1973); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 28 L.Ed.2d 419 (1970).

Thus there is a well established automobile exception to the search warrant requirement. Usually that exception is applied to moving vehicles stopped by the

police on a highway, but the exception is not restricted to such cases. In the Bannister decision a warrantless search of an automobile was held valid, even though the vehicle was standing at a gas station when the officer approached it. Colorado v. Bannister, 449 U.S. 1, 101 S.Ct. 42, 66 L.Ed.2d 1 (1980). In White the automobile exception to the search warrant requirement was applied after a vehicle was stopped at a drive-in window of a bank. Texas v. White, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed. 2d 209 (1975). In Caldwell, a warrantless exterior search of an automobile was held proper after the car had been towed from a public parking lot. Caldwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974). And in Cady a warrantless search of an automobile was held valid after the vacant vehicle had been towed following an

accident. Cady v. Dombrowksi, 413 U.S. 433, 93 S.ct. 2523, 37 L.Ed.2d 706 (1973).

By those standards the search in this case fell within the automobile exception to the search warrant requirement. The officers did not enter into respondent's property to search his automobile, but instead entered to execute a lawful search warrant for the house. The officers to not seek out respondent's car, but instead the vehicle unexpectedly arrived at the scene. The officers did not have probable cause to search the automobile until shortly before that search was performed. The automobile exception to the search warrant requirement exists because of the inherent mobility of vehicles and because of the diminished expectation of privacy which surrounds them. United States v. Chadwick, 433 U.S. 1, 12, 97 S.Ct. 2476, 2484, 53

L.Ed.2d 538, 549 (1977). But, as stated in Chadwick, that exception applies even after the vehicle had been immobilized. Therefore when police officers unexpectedly encounter an automobile and have probable cause to search it, they may perform a immediate search even if the vehicle is parked and the owner had stepped out of it.

Such a search is reasonable under the Fourth Amendment because impounding the vehicle pending an application for a warrant would involved a greater intrusion on the owner's privacy rights than an immediate search. As this Court said in Chambers v. Maroney, 399 U.S. 42, 52, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970)

> For constitutional purposes, we see no difference between on the one had seizing and holding a car before presenting the probable case to a magistrate and on the other hand carrying out an immediate search

without a warrant.

If the officers had impounded respondent's automobile pending an application for a warrant, the car would either have been towed or the police would have posted guard on it, probably overnight. This would have created a greater intrusion on respondent's privacy rights than the warrantless search. Therefore, a warrantless search was reasonable under the circumstances of this case.

It is true that in the Coolidge decision four justices of this Court indicated that police officers may not enter onto a suspect's property to search an automobile when there is time and opportunity to seek a warrant. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Here, however, the officers did not enter into respondent's property to

search his vehicle, but to execute a lawful warrant to search respondent's house and person. The automobile was not present when the officers arrived, but appeared without warning while the officers were searching the house. After the officers first saw the automobile, they could have obtained a warrant only after impounding it.

The fact that the officers did obtain a search warrant for respondent's house and person shows that the officers were not trying to evade the search warrant requirement. Moreover, the officers were justified in not seeking authority to search respondent's automobile at the time they applied for the warrant. Although the informant had seen respondent removing a large quantity of marijuana from the car the previous day, when the officers applied

for the warrant they had no information indicating that nay contraband was still in the vehicle. (R. 70-71) Also, neither the affidavit nor anything else in the record indicates that the informant supplied a description of the automobile. (R. 70-71) The application for the warrant had to give both a specific description of the place to be searched and information indicating that evidence was presently to be found there. Ill. Rev. Stat. 1971, ch. 38, sec. 108-1. When Officer Smith applied for a search warrant, such information was not available concerning respondent's automobile.

But after respondent was searched and placed under arrest, there was probable cause to search his vehicle. The large quantity of marijuana seen by the informant had not been found in the house. The previous day respondent had transported the

marijuana to the house in his car, and respondent had just arrived at the house in his car again. Smaller quantities of cocaine and marijuana were found on respondent's person, and several thousand dollars were found in his wife's purse. Thus the officers searched respondent's automobile as soon as they acquired probable cause to believe that it contained contraband.

Here the officers, after they acquired probable cause, searched an automobile which had just been parked and left by respondent. This Court should accpet jurisidiction in order to resolve the important question of whether the automobile exception to the search warrant requirement applies to such searches.

CONCLUSION

For the foregoing reasons, the State of Illinois respectfully requests that a writ of certiorari issue to review the judgment of the Apellate Court of Illinois, First District.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the Appellate Court of Illinois, First District in People v. Thomas Fogel, (Unpublished Order, No. 83-1517, June 29, 1984).

June 29, 1984

83-1517

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant,	)	Appeal from the Circuit Court of Cook County.
vs.	)	
THOMAS FOGEL, Defendant-Appellee.	)	Honorable Paul A. O'Malley. Judge Presiding.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

The defendant was charged with unlawful possession with intent to deliver more than 500 grams of marijuana recovered from his automobile trunk, possession of less than 30 grams of cocaine recovered from his person, and possession with intent to deliver between 30 and 500 grams of mari-

juana also recovered from his person. His pretrial motion to suppress the evidence obtained from the search of his automobile trunk was sustained. The State has appealed that ruling, asserting that the search of the defendant's automobile trunk was justified.

At the hearing, the State introduced as evidence a complaint for a search warrant and the search warrant itself.[1] In the complaint the arresting police officer stated that an informant, who previously had proved to be reliable, told him that he helped carry two large plastic bags from the defendant's car to his house. Inside the defendant's house, the informant saw that the bag contained marijuana; he also

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1 Although there was some question raised later at the hearing as to whether the complaint was admitted as an exhibit, we find that it was properly admitted and that it is part of the record on appeal.

smoked the substance, which the defendant told him was marijuana. The search warrant then issued for the defendant and his house.

The arresting officer, who was the only witness at the hearing, testified that he and three other officers went to the house with the warrant and entered forcibly because a man in the house would not let him inside.[2] A van, which never was searched, was parked in the driveway. After police searched the premises for about one and one-half hours and found nothing, the defendant and his wife returned home in an

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2 About 18 hours elasped between the time the informant saw the alleged marijuana at the defendant's house and when the house actually was searched by the police.

automobile. As the defendant and his wife entered the house, the police confronted defendant and found plastic bags with what appeared to be marijuana and cocaine inside the briefcase defendant was carrying. They also found nearly $3,000 in the purse of defendant's wife. He next took the defendant's keys and went to the automobile. He unlocked the car door and found nothing inside the car, including the glove compartment; however, when he opened the trunk with the keys, he found two large plastic bags which apparently contained marijuana. A this point, although the defendant had already been arrested, his wife and the other man who was in the house were not taken into custody. The police learned that the car which was in the driveway about 25 feet from the house was registered to the defendant and his wife.

In ruling that the evidence seized in the search of the defendant's automobile trunk was inadmissible, the trial judge concluded that a warrant should have been obtained. In part, he found no exigent circumstances to justify such a warrantless search. He particularly emphasized that 10 to 15 minutes elapsed from the time the defendant was searched until the trunk was opened, that it was not clear at the time of the search that the defendant owned the car, and that the van in the driveway never was searched.

We must affirm the ruling of the trial judge. Initially, we note that the search warrant extended only to the defendant's person and his house. Although the police could have requested a warrant for the automobile as well, no mention whatsoever was made in any automobile in the warrant, even though the complaint for the warrant

specifically stated that the informat had said that the two bags of marijuana were carried from an "auto" to the defendant's house. Thus, once the defendant left the car and was arrested inside the house, the police had no justification for seizing his car keys, going outside to the car and opening the automobile trunk. No danger existed to the police or to the public, and so the search clearly was not authorized as incidential to arrest. Further, no evidence of any crime of its fruits was in plain view inside the car to justify a seizure. Also, the car itself was not a nuisance that first had to be removed from a public area and then searched. Here, another vehicle already parked outside the defendant's house was never searched. Nothing in their search of the house or in the defendant's arrest gave the police

additional grounds to suspect that contraband was in the car. The police did not learn until after they already had arrested the defendant, taken the keys, and searched the parked automobile that the car actually belonged to the defendant and his wife. Thus, we cannot say that the trial judge's ruling that the warrantless search was illegal was manifestly erroneous. (See People v. Clark, (1982), 92 Ill.2d 96, 440 N.E.2d 869; People v. Jones, (1977), 45 Ill. App.3d 307, 359 N.E.2d 856.) Although the State contends that the search was justified by the exigent circumstances that the contraband could have been destroyed if the police withdrew to obtain a warrant, we will not disturb the trial judge's ruling on this basis either. Because the car itself was parked and locked on a private driveway, and the

contraband was hidden from view in the trunk, there was minimal danger that a stranger might take the car or break into it and remove or destroy the evidence. The defendant himself already had been taken into custody. Although his wife or the other man in the house might have had access to the car (even though a set of keys had been seized), one of the officers could have remained to watch the parked car,[3] while the others left to request a search warrant for the car from the judge. Clearly, time was not the essence here; the police did not even search the car until 10 to 15 minutes after they initially seized the drugs and arrested the defendant. And there was no indications that obtaining

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3 However, the caselaw suggests that immobilizing the vehicle until a warrant was obtained would have been improper. See People v. Peter (1973), 55 Ill.2d 443, 303 N.E.2d 398.

another search warrant would have been particularly inpractical for the police. Thus, the circumstances were not so extreme as to justify the police in effectively eliminating the search warrant requirement, and thereby usurping the judicial function of determining whether probable cause existed to search the automobile. See Collidge v. New Hampshire (1971), 403 U.S. 443, 29 L.Ed.2d 565, 91 S.Ct. 2022. See also, Cady v. Dombrowski (1973), 413 US. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523.

According, the judgment of the circuit court is affirmed.

SULLIVAN, J. MEJDA, P.J. and LORENZ,J., concur.

APPENDIX B

Order of the Illinois Supreme Court denying leave to appeal in People v. Thomas Fogel (No. 60572, October 2, 1984).

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October 2, 1984

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No. 60572 - People State of Illinois, petitioner, vs. Thomas Fogel, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above cited cause.

The mandate of this Court will issue to the Clerk of the Appellate Court on October 23, 1984.